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No. 97-471

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., A LAW PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

WILLIAM F. LLOYD
JEFFREY R. TONE
NANCY A. TEMPLE
HILLE R. SHEPPARD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

DONALD W. ROSE
Associate General Counsel
KPMG PEAT MARWICK LLP
55 East 52nd Street, 32nd Floor
New York, New York 10055
(212) 909-5412

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents KPMG Peat Marwick LLP and Robert W.L. Spence

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the court of appeals was precluded from exercising its discretion to refuse to certify an issue to a state supreme court in the peculiar circumstances of this case.

2. Whether granting the petition, vacating the judgment below, and remanding for further consideration in light of a decision by the Kansas Supreme Court is appropriate where (1) the Eighth Circuit's decision does not rest upon any premise that the Eighth Circuit would now reject, (2) the Kansas Supreme Court's decision would have no effect on the ultimate outcome of this litigation, and (3) granting the petition would reward petitioner's abusive and manipulative litigation tactics.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed by petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Supreme Court Rule 29.6, respondent KPMG Peat Marwick LLP states that it is a limited liability partnership with no parent companies or publicly-held subsidiaries. Respondent Robert W.L. Spence is an individual.

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

KPMG Peat Marwick LLP and Robert W.L. Spence ("Peat Marwick") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the Kansas Public Employees Retirement System ("KPERS").

This is the fourth petition for certiorari that petitioner has filed in this case, which has already resulted in seven published opinions from the United States Court of Appeals for the Eighth Circuit (with another appeal currently pending there). Contrary to what its tortured history would suggest, this is not inherently a particularly complicated case. Rather, as the Eighth Circuit has observed, the case involves garden-variety tort claims arising from petitioner's investment losses. *KPERS v. Reimer*

& Koger Assocs., Inc., 77 F.3d 1063, 1071 (8th Cir.) ("*KPERS IV*"), *cert. denied*, 117 S. Ct. 359 (1996). It is petitioner's litigating tactics that have added years—and multiple trips to the Eighth Circuit—to the life of this litigation.

Much of the litigation in this case has resulted from petitioner's admitted attempts to avoid federal jurisdiction and to circumvent an adverse July 1995 decision by the Eighth Circuit on the applicable statute of limitations. Once it was finally able to apply the Eighth Circuit's ruling to the facts of this case, the district court entered final judgment against petitioner, and the Eighth Circuit affirmed. It is from that decision that petitioner now seeks this Court's review.

The petition does not suggest that there is any conflict between the Eighth Circuit's decision and any decision of this Court or any other court of appeals. Instead, petitioner seeks certiorari on the question of whether this Court should replace the well-settled standards governing certification of state-law questions to state courts with a new rule that would *require* certification, though under what circumstances is not clear. This question seeks an advisory opinion only, however, because a ruling in petitioner's favor would have no impact on this case, and the unique factual circumstances of this case make it a particularly inappropriate vehicle for establishing a rule of general applicability. In any event, the Eighth Circuit's decision not to certify the state-law question in the decision under review was entirely correct.

Petitioner alternatively suggests that this Court should grant the petition, vacate the judgment below, and remand to the Eighth Circuit for reconsideration in light of a Kansas Supreme Court decision that post-dated the Eighth Circuit's decision. A GVR order would be inappropriate here, however, because the Eighth Circuit's decision does not rest on any premise that it would now reject and because the Kansas Supreme Court's decision would not

affect the ultimate outcome of this case. Moreover, a GVR order is inappropriate here for reasons this Court has previously identified in other cases: (1) it is part of an unfair or manipulative litigation strategy, and (2) the delay and further cost entailed in a remand are not justified by the potential benefits of future consideration by the lower court. To the contrary, this litigation should be permitted finally to come to an end by denial of certiorari.

DECISIONS BELOW

In addition to the decisions below referred to in the petition, the Eighth Circuit denied a second petition for rehearing *en banc* and for recall of the mandate on September 9, 1997.

Prior to the decision appealed from here, the Eighth Circuit decided that Missouri law applied to this case and that Missouri would borrow and apply a Kansas two-year statute of limitations for torts; this Court declined review. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) ("*KPERS III*"), *cert. denied*, 116 S. Ct. 915 (1996). The Eighth Circuit also issued reported decisions in five other related interlocutory appeals, two of which this Court declined to review. *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) ("*KPERS V*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir.) ("*KPERS IV*"), *cert. denied*, 117 S. Ct. 359 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) ("*KPERS II*"); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 511 U.S. 1126 (1994).

Subsequent to the decision appealed from here, petitioner also appealed to the Eighth Circuit an award of attorneys' fees and costs to Peat Marwick and others under 28 U.S.C. § 1927. That appeal is currently pending. *KPERS v. Reimer & Koger Assocs., Inc.*, Consolidated Case Nos. 97-1880 and 97-2811 ("*KPERS VII*").

STATUTES INVOLVED

Mo. REV. STAT. § 516.190 (the "Missouri borrowing statute") provides:

> Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

12 U.S.C. § 1441a(*l*)(1) provides:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust] Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

12 U.S.C. § 1441a(*l*)(3) provides:

> The [Resolution Trust] Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [Resolution Trust] Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [Resolution Trust] Corporation as conservator or receiver of such institution. . . .

COUNTERSTATEMENT OF THE CASE

Petitioner portrays the Eighth Circuit as running roughshod over meritorious arguments and disregarding applicable law. In fact, it is petitioner that has acted unreasonably. The Eighth Circuit has properly applied the law in every respect.

1. Petitioner is the pension fund for certain state and municipal employees in Kansas, including the Kansas judiciary. In 1983, Kansas Governor John Carlin began to promote the use of a portion of petitioner's money to stimulate the Kansas economy. Petitioner's investment consultants advised petitioner at that time that investing public pension fund moneys as venture capital to promote regional business would be a high-risk undertaking. Nevertheless, in 1985, petitioner established a special "Kansas Investment Fund" to make direct investments in Kansas ventures. Petitioner's board allocated no more than 10% of petitioner's overall $2.6 billion fund to such investments.

One of petitioner's targeted investments was in a Kansas City savings and loan named Home Savings Association of Kansas City, N.A. ("Home Savings"). In all, petitioner invested $65 million in Home Savings. Home Savings was closed by federal bank regulators in 1991, and the Resolution Trust Corporation ("RTC") was appointed as receiver. Petitioner lost its $65 million in principal, though it had earlier received some $29 million in interest payments.

The seizure of Home Savings led to what the former chairman of KPERS characterized as a "political feeding frenzy" in Kansas. (Peat Marwick's Appendix in the Eighth Circuit, p. 1369.) As a result, petitioner filed suit in Shawnee County, Kansas, against its former investment advisor, which had been responsible for making petitioner's investment in Home Savings. About six months later, petitioner sued its former auditor, Peat Marwick, and the former officers and directors of Home Savings (the "Home Savings defendants").[1]

The RTC promptly moved to intervene in the case to protect its claims against Peat Marwick and the

[1] Petitioner's Sixth Amended Complaint is pleaded in fifteen counts and asserts a variety of standard tort theories, including common law fraud, statutory securities fraud, various breaches of fiduciary and professional duties, negligence, breach of contract, and civil conspiracy.

Home Savings defendants and to remove the case to federal court. Under federal law specifically enacted to deal with the savings-and-loan crisis, the RTC had the right to remove to federal court any case concerning a savings and loan of which it was the receiver. 12 U.S.C. § 1441a(*l*)(3). The Kansas judge to whom the case was assigned effectively blocked the removal by refusing to rule on the RTC's intervention motion. Eventually, the Home Savings defendants filed third-party claims against the RTC, asserting that it was responsible for alleged damages incurred during its management of Home Savings and that it had an obligation to indemnify them.[2]

In an attempt to prevent the RTC from removing the entire case, petitioner asked the Kansas state judge, in a highly irregular *ex parte* proceeding, to sever the third-party claims from the rest of the case. The Kansas state judge acquiesced, stating:

> The Court is familiar with the history of this case, [and] feels that under the circumstances the addition of the Resolution Trust Corporation . . . by the third-party petition would subject this case to removal under the federal statutes. . . . [T]he Court [does] not feel that . . . to maintain [the third-party claims] in the same case [as the principal claims] and subjecting [the entire] case to removal would be in the best interests of the advancement of the princip[al] case. . . . I . . . sign ex parte the order to sever and direct . . . that the third party claim be severed and filed . . . as a separate case entirely from the previous [case]. . . . [T]he Court considers this matter on an emergency basis.

KPERS I, 4 F.3d at 616-17 (alterations in *KPERS I*).[3]

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[2] The RTC conceded that the claims against it were "not frivolous," and the Eighth Circuit agreed. *KPERS I*, 4 F.3d at 621-22.

[3] The Kansas state judge was subsequently disqualified for personal bias from all litigation involving petitioner due in part to his pre-removal actions in this case.

The RTC removed the case to federal court in Kansas City, Missouri, the location of Home Savings, under 12 U.S.C. § 1441a(*l*)(3). The district court ruled that the Kansas state judge's *ex parte* severance order violated the Supremacy Clause and was therefore ineffective to deprive the RTC of its right to remove the "entire case" under § 1441a(*l*)(3). The Eighth Circuit, in a ruling not challenged here, affirmed the initial removal to federal court. *KPERS I*, 4 F.3d at 622, *cert. denied*, 511 U.S. 1126 (1994). Ultimately, the third-party claims against the RTC were dismissed,[4] but the district court exercised its discretion to retain the case based on the factors of judicial economy[5] and fairness to the parties[6] set forth in

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[4] Petitioner's representation that after the claims against it were dismissed, the RTC had "informed the district court that it had no furher interest in the case remaining in federal court" (Pet., p. 5 n.6), is grossly misleading. The RTC has been continually involved in this case to ensure that the claims being asserted by petitioner against certain defendants were not derivative claims that rightly belonged to the RTC as receiver of a failed savings and loan. In fact, as noted above, the RTC itself moved to intervene in the case long before it was served with the third-party complaint. After the district court dismissed the third-party complaint against the RTC, it granted the RTC's motion for status as a limited intervenor. Thus, the RTC remained involved in the case after the dismissal of the third-party complaint against it, and it even attended depositions and hearings to protect its interests.

[5] As of June 30, 1994, *before* the Eighth Circuit's decision in *KPERS III* that engendered the majority of petitioner's abusive litigation tactics designed to delay or prevent implementation of that decision, the district court "had already spent more time on this case than any other case but one in 10 years." *KPERS V*, 85 F.3d at 1355.

[6] The district court's fairness concerns were based on the fact that all Kansas judges are beneficiaries of petitioner and on the unusual circumstances surrounding the state court judge's after-hours, *ex parte* severance of the claim against the RTC:

> My concern about fairness focuses on the appearances generated by the obvious benefit to any member of KPERS, including the Kansas judges, who could receive increased benefits if KPERS

28 U.S.C. § 1367. The Eighth Circuit affirmed, holding that once the RTC becomes a party to a case, under 12 U.S.C. § 1441a(*l*)(1), "the entire action is 'deemed to arise under the laws of the United States' and is within the original jurisdiction of the district court." *KPERS IV*, 77 F.3d at 1067.

2. During the pendency of this case, the Home Savings defendants raised the statute of limitations as a defense. In response, the Kansas legislature enacted a new ten-year statute of limitations applicable only to actions brought on behalf of petitioner. KAN. STAT. ANN. § 60-522 (1992). When the Home Savings defendants moved for summary judgment, arguing that the new ten-year statute did not apply because the legislature had not expressed an intent to revive barred actions, the legislature amended the statute to add a new section purporting to make the statute retroactive. *See KPERS III*, 61 F.3d at 614.

The Home Savings defendants' summary judgment motions based on the statute of limitations presented the district court with two important preliminary questions: (1) whether the RTC removal statute, 12 U.S.C. § 1441a(*l*)(3), which allowed the RTC to remove the case from Kansas state court to federal court in Missouri, would change the applicable limitations law from Kansas to Missouri, and (2) whether the Kansas legislature's passage of the KPERS-specific, ten-year statute of limitations would, under Kansas law, apply retroactively only to claims not yet time-barred or would also revive already time-

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is successful in this case. Furthermore, as I stated at the Ju[ne] 30, 1994, hearing, the Shawnee County District judge's participation in KPERS' ex parte efforts to thwart the RTC's removal rights "creates a reasonable concern about the manner in which the parties to this case might be treated if [the case] is returned to . . . Shawnee County." Tr. 199. All of the parties in this case deserve a forum for the resolution of their dispute free of these influences.

(Peat Marwick's *KPERS IV* Appendix in the Eighth Circuit, p. 39.)

barred claims. In answering the first question, the district court analogized the situation in this case to a transfer case under 28 U.S.C. § 1404(a), and therefore decided to apply Kansas's limitations law. The district court then determined that petitioner was subject to a statute of limitations under Kansas law. Finally, the district court denied the motions, holding that petitioner's claims were revived by the special ten-year statute of limitations. The Home Savings defendants appealed.

On appeal, petitioner argued to the Eighth Circuit that, under Kansas law, the KPERS-specific, ten-year statute of limitations effectively *lengthened,* retroactively, the statute of limitations applicable to its claims here. *KPERS III*, 61 F.3d at 614. Petitioner never suggested to the Eighth Circuit that, prior to passage of the ten-year statute, its claims were not subject to any statute of limitations. Nor did petitioner ask the Eighth Circuit to certify the statute of limitations question to the Kansas Supreme Court.

The Eighth Circuit held that under the RTC removal statute, the district court should apply the law of the forum, *i.e.*, Missouri law. *Id.* The Eighth Circuit then held that Missouri would borrow the Kansas statute of limitations if it were shorter than Missouri's and if it would fully bar petitioner's claims. *Id.* Turning to the applicability of the KPERS-specific, ten-year statute of limitations, the Eighth Circuit held that under clear authority from the Kansas Supreme Court, the statute did not revive time-barred claims. *Id.* at 615. Accordingly, the Eighth Circuit held that the statute did not apply to petitioner's claims. *Id.* Rather, it held, "the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statutes to KPERS' claims if the claims would be 'fully barred' by these statutes (a finding of fact which has not been made)." *Id.* The *KPERS III* mandate specifically directed the district court to make that finding of fact and to "determine whether KPERS'

claims are time-barred under the applicable Kansas statutes." *Id.* at 616.

In its petition for rehearing of *KPERS III*, petitioner for the first time asked the Eighth Circuit to certify a question to the Kansas Supreme Court, but *not* the question that it now argues the Eighth Circuit should have certified. Petitioner did not argue, as it does now in this Court, that its claims had not been subject to any statute of limitations prior to the passage of the ten-year statute, but instead argued that the Eighth Circuit had misinterpreted the effectiveness of the ten-year statute to *extend* the period of limitations applicable to its claims. Subsequently, when it petitioned this Court for a writ of certiorari, the issue petitioner presented was whether there was a "retroactive *lengthening* of the statute of limitations" (emphasis added). At that time, petitioner did not argue to this Court that its claims had been subject to no statute of limitations before the passage of the ten-year statute, nor did it argue that the Eighth Circuit had erred by failing to certify questions to the Kansas Supreme Court.

3. Petitioner responded to the Eighth Circuit's decision in *KPERS III*—the factual application of which would almost certainly defeat petitioner's claims—by embarking upon what the Eighth Circuit has held was "a strategic and tactical plan to delay and prevent the district court from ruling on [respondents'] summary judgment motions." *KPERS V*, 85 F.3d at 1359. Petitioner "undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case." *Id.* Thus, petitioner filed a series of duplicative motions asking the district court to revisit prior holdings. For example, petitioner filed a second "renewed" motion to remand this case to state court, which sought to have the district court reconsider both the *KPERS I* decision that the case had been properly removed and the district court's June 30, 1994, decision not to remand after dis-

missing the claims against the RTC. After analyzing the applicable precedent, the district court again rejected petitioner's arguments and denied the motion to remand, noting that "[s]ince the Eighth Circuit Court of Appeals' decision on July 27, 1995, [petitioner] has taken a number of steps, including the filing of this motion [to remand], to delay the expeditious resolution of this case." *KPERS V*, 85 F.3d at 1359 (quoting the district court).

Two days before the scheduled hearing on its second renewed motion to remand, petitioner moved to disqualify the district court and moved to stay all proceedings pending disposition of that motion. After extensive further briefing and hearings, the district court denied the motion to disqualify. In denying petitioner's subsequent petition for a writ of mandamus seeking disqualification of the district court judge, the Eighth Circuit concluded that "[o]ur review of [petitioner's] pattern of conduct leads us to the conclusion that the defendants' allegation that [petitioner's] recusal motion and this [mandamus] petition were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct." *Id.* at 1360.

As part of its campaign to circumvent the Eighth Circuit's decision, on August 23, 1995, petitioner filed two separate actions in Shawnee County, Kansas, seeking the same relief from the same defendants based on the same facts alleged in the case pending before the federal district court.[7] Lead trial counsel for petitioner proclaimed to the press that petitioner filed the duplicative actions because

[7] Petitioner's suggestion that it sought permission to file the separate state-court actions before doing so (Pet. 5 n.6) is untrue. In fact, the district court ultimately awarded Peat Marwick and others attorneys' fees and costs incurred in obtaining an injunction against the prosecution of the duplicative actions under 28 U.S.C. § 1927, finding that petitioner had "acted with objectively unreasonable behavior and bad faith when it brought suit . . . in Kansas state court." (Petitioner's *KPERS VII* Addendum in the Eighth Circuit, p. 3.)

of "a multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations." *KPERS IV*, 77 F.3d at 1066. The Eighth Circuit found that "the effect of the Kansas lawsuits [was] to subvert the district court's removal jurisdiction." *Id.* at 1065. Accordingly, it affirmed the district court's entry of a preliminary injunction against duplicative state-court actions. *Id.* at 1071, *cert. denied*, 117 S. Ct. 359 (1996).[8]

4. Ultimately, despite petitioner's obstructionist tactics, the district court held hearings on defendants-respondents' motions for summary judgment, followed the dictates of the Eighth Circuit concerning the applicable law, and, applying it in a straightforward manner to the factual record fully developed after the depositions of approximately 60 fact witnesses and the exchange of approximately 20 expert reports, granted summary judgment to the defendants on the ground that petitioner's claims were time-barred. (App. 78a, 97a, 98a, 100a.)

In the decision below, the Eighth Circuit affirmed the district court's straightforward factual application of *KPERS III*. Indeed, petitioner only halfheartedly argued that its claims were not barred by the undisputed facts. Instead, petitioner focused its energies on rearguing the limitations questions decided by the Eighth Circuit in *KPERS III*, and again sought to have the Eighth Circuit certify a statute of limitations issue to the Kansas Supreme Court, albeit a different issue than it had presented in its rehearing petition in *KPERS III*. Noting that the certification request came too late, the Eighth Circuit declined to certify the statute of limitations issue to the Kansas Supreme Court:

> In *KPERS III* we decided that the Missouri borrowing statute required the application of the Kansas

[8] That injunction has since been made permanent. (*See* App. 23a.) Petitioner does not seek review of it here.

> two- and three-year statutes of limitation. KPERS's petitions for rehearing en banc and for certiorari were denied. Our ruling in *KPERS III* is the law of the case, and we reject the suggestion that these issues be certified to another tribunal.

(App. 13a.) "[S]atisfied that the law of the case doctrine prevents [petitioner] from relitigating the issue of whether these statutes [of limitations] apply to its claims," the Eighth Circuit also declined to revisit its prior holdings. (*Id.*) Nevertheless, relying on two Kansas Supreme Court cases directly on point, the Eighth Circuit addressed and rejected petitioner's argument that it was not subject to any statute of limitations. (App. 13a-15a.) Thereafter, the Eighth Circuit denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. (App. 24a.)

After the Eighth Circuit issued the decision below, the Kansas Supreme Court, in other litigation to which petitioner is a party,[9] decided that the special ten-year statute of limitations revives already time-barred claims brought on behalf of petitioner. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997). Because the Eighth Circuit's *KPERS III* decision that the ten-year statute was ineffective to revive already barred claims was based on clear Kansas authority, petitioner had followed a different approach in the Kansas state courts. There, petitioner argued that it had never been subject to any statute of limitations until the legislature passed the new ten-year statute. Notwithstanding the clear evidence that the statute was enacted to lengthen the existing period of repose (as petitioner had previously argued to the Eighth Circuit and to this Court), the Kansas Supreme Court, purporting to rely on the very same cases as the Eighth Circuit did in rejecting petitioner's argument, accepted petitioner's argument. In doing so, the Kansas Supreme Court did not overturn any prior Kansas precedent.

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[9] Respondent Peat Marwick is not a party to the cases in Kansas state court that generated this recent opinion.

REASONS FOR DENYING THE PETITION

This petition presents no questions worthy of this Court's attention. The first question seeks an advisory opinion only. The second question seeks a GVR order without meeting any of this Court's requirements for issuing such an order. Finally, granting petitioner relief at this stage would serve only to reward its abusive and manipulative litigation tactics.

1. The first question—which seeks to have this Court create a new rule of law *requiring* that a federal court certify an issue to a state court or at least stay its hand pending the state court's consideration of the issue—cannot properly be decided in the context of this case because the Kansas Supreme Court has already rendered its decision. On remand, therefore, there could be no call for the Eighth Circuit to certify any question to the Kansas Supreme Court or to stay its hand pending a decision by that court. Thus, the petition seeks an advisory opinion only. It is well established, however, that this Court does not render advisory opinions. *E.g., Trailmobile Co. v. Whirls,* 331 U.S. 40, 48 (1947).

Even if it had not been mooted by the Kansas Supreme Court's decision, the first question still would not be worthy of this Court's attention. This Court has made clear that whether to certify a question in a given case "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974). Petitioner proposes to make certification non-discretionary, at least where a state agency is one of the parties. Petitioner thus seeks to make certification "obligatory"—something this Court has specifically refused to do. *Id.* at 390; *see also id.* at 394 (Rehnquist, J., concurring) ("I assume it would be unthinkable to any of the Members of this Court to prescribe the process by which a district court or a court of appeals should go about researching a point of state law."). Beyond its unhappiness with the Eighth Circuit's decision below, petitioner offers no reason

for this Court to change the rule of law applicable to certification.[10]

Moreover, the Eighth Circuit did not abuse its discretion in declining to certify the statute of limitations issue or to stay its hand. First, the Eighth Circuit had already decided the statute of limitations issue in *KPERS III*, where petitioner did not seek certification and where petitioner took positions inconsistent with its position in the most recent argument to the Eighth Circuit.[11] In the decision below, the Eighth Circuit relied on *KPERS III* in refusing to certify: "Our ruling in *KPERS III* is the law of the case, and we reject the suggestion that these issues be certified to another tribunal." (App. 15a.) Second, certification is appropriate where a case presents "novel or unsettled questions of state law," and especially where certification might allow a constitutional challenge

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[10] Where warranted, the courts of appeals, including the Eighth Circuit, routinely certify issues to the state supreme courts. *E.g.*, *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 370 (8th Cir. 1997) (certifying question to Minnesota Supreme Court). Requiring that they do so where a state court has a particular issue under consideration—and where there can be no guarantee the state court will actually address the issue—would require already overburdened federal courts to evaluate a state court's docket before ruling on any particular issue. Removal of the courts of appeals' discretion to weigh such factors as the relative efficiency of certification, their familiarity with the issue before them, and whether one party to an appeal had engaged in abusive litigation tactics in order to manufacture an apparent need for certification, would inappropriately restrict those courts in their ability to manage their extensive dockets.

[11] In *KPERS III*, petitioner argued that the ten-year statute of limitations *extended* the period in which it had to file suit. In the most recent argument below, however, petitioner took the exact opposite position, arguing that it had never been subject to any statute of limitations until the ten-year statute was passed. Even in its rehearing petition in *KPERS III*, in which petitioner first sought certification to the Kansas Supreme Court, petitioner did not seek to have the question whether it was subject to any statute of limitations certified. Notably, petitioner did not complain about the failure to certify in its *KPERS III* petition for a writ of certiorari.

to be avoided. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073-74 (1997). This case did not present novel or unsettled questions of law, as there was Kansas Supreme Court authority directly addressing the applicability of the statute of limitations to petitioner (on which the Kansas Supreme Court itself relied in its decision), and the Eighth Circuit did not invalidate a state statute on constitutional grounds. Rather, this case involved the straightforward application of state statute of limitations law to state tort claims—a task which federal courts routinely manage.[12] Third, petitioner had engaged in abusive and manipulative litigation tactics throughout this case, both to avoid federal jurisdiction and to evade the Eighth Circuit's decision in *KPERS III*, manifestly increasing the cost of this case both to the federal judiciary and to respondents. *See supra*, pp. 10-12. These are all factors that the Eighth Circuit could properly consider in exercising its discretion to deny certification.

Finally, the highly unusual history and procedural posture of this case make it a particularly inappropriate case in which to attempt to establish a rule of general applicability. First, the RTC's involvement in this case is critical, because that involvement converted this case into a federal-question case under 12 U.S.C. § 1441a(*l*)(1). Such circumstances are unlikely to recur, given that the RTC ceased to exist as of December 1995. *See* 12 U.S.C. § 1441a(m). Second, as a matter of federal law under *KPERS III*, the governing limitations law is that of the forum—Missouri—including its borrowing statute. Kansas law is relevant only to the extent borrowed by Missouri.

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[12] *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 110-12 (1945) (in diversity cases, forum state's limitations law governs); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (applying borrowing statutes of forum state leads to ultimate application of statute from state where cause accrued). Moreover, the "very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

Third, this case has had so many interlocutory appeals that the Eighth Circuit was unusually familiar with the facts, the law, and the parties' litigation tactics when it exercised its discretion not to certify the question requested by petitioner.[13] Fourth, petitioner took inconsistent positions during interlocutory appeals both in the Eighth Circuit and in this Court both on the merits of the issue it sought to have certified and on the question it now asserts the Eighth Circuit was required to have certified; in addition, the courts below have specifically found that petitioner has engaged in improper litigation tactics for the very purpose of delaying entry of final judgment in federal court in order to create the apparent conflict which petitioner now contends required certification. For all of these reasons, it would be difficult in this case to craft a useful rule of general applicability, and any rule created here would necessarily have little precedential value.

2. This Court's discretionary GVR power "should be exercised sparingly." *Lawrence v. Chater*, 116 S. Ct. 604, 609 (1996) (*per curiam*). Under this Court's caselaw, a GVR order should be considered only where intervening developments that were not fully considered below (1) reveal a reasonable probability that the decision below rests on a premise that the court below would now reject, and (2) if applied, will determine the ultimate outcome of the litigation. *Id.* at 607. Neither of those requirements is met in this case.

First, there is no reasonable probability that the Eighth Circuit's decision rests on a premise that the Eighth Circuit would now reject. As noted above, because of the large number of interlocutory appeals, the Eighth Circuit had great familiarity with this case. The Eighth Circuit understood well the unique circumstances presented by this

[13] The decision below represents the seventh unanimous decision rendered by the Eighth Circuit in this case. Two of the three panelists below had also sat on the other six *KPERS* panels, and the third panelist had sat on two other *KPERS* panels.

case, including the removal to federal court in Missouri pursuant to the RTC removal statute, 12 U.S.C. § 1441a(*l*)(3), the fact that this case turns on the application of Missouri law, the fact that the statute of limitations issue was already decided in *KPERS III*, and the various positions advanced by petitioner. Before rendering its decision below, the Eighth Circuit was not only fully advised of the pendency of the Kansas Supreme Court case, but also of the reasons why resolution of the issues pending before that court would make no difference to the ultimate outcome of this case. The fact that the court below decided this case without waiting for the Kansas Supreme Court's decision is a result of the Eighth Circuit's conclusion that the Kansas court's decision would not be outcome-determinative of this case. After the Kansas Supreme Court's decision, the Eighth Circuit was provided with a copy of the Kansas Supreme Court's decision, and thus had the opportunity to consider whether vacating the decision below was appropriate. The Eighth Circuit chose not to do so.

The Eighth Circuit, of course, had decided the statute of limitations question in *KPERS III*. At that stage, petitioner effectively conceded that it was subject to *some* statute of limitations, arguing that the new ten-year statute *lengthened* the time in which it had to sue. The Eighth Circuit's straightforward decision that the legislature had not revived petitioner's claims, which was based squarely on Kansas Supreme Court authority,[14] thus became the law of the case.

In the proceedings below, petitioner attempted to litigate the statute of limitations question anew, without regard to the fact that the Eighth Circuit had already decided the issue in *KPERS III*. Petitioner argued—in direct opposition to its arguments to the Eighth Circuit in *KPERS III* and in its corresponding petition for certiorari to this Court—that it was not subject to *any* statute of

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[14] *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958 (Kan. 1992).

limitations until the legislature passed the ten-year statute. "[S]atisfied that the law of the case doctrine prevents [petitioner] from relitigating the issue of whether these statutes [of limitations] apply to its claims," the Eighth Circuit rejected petitioner's attempt to revisit that issue in the decision below. (App. 13a.)

Nor did the Kansas Supreme Court's decision overrule any of the cases on which the Eighth Circuit relied, either in *KPERS III* or in the decision below. *Compare Lords Landing Village Condominium Council v. Continental Ins. Co.*, 117 S. Ct. 1731, 1732 (1997) (*per curiam*) (GVR order entered because "[t]he Maryland Court of Appeals also expressly disapproved [the] two decisions on which the Court of Appeals had primarily relied"). Rather, the Kansas Supreme Court simply accepted the second of the two inconsistent approaches petitioner had presented to the Eighth Circuit. *Cf. Department of the Interior v. South Dakota*, 117 S. Ct. 286, 287 (1996) (Scalia, J., dissenting) ("But we have never before GVR'd simply because the Government, having lost below, wishes to try out a new legal position. The unfairness of such a practice to the litigant who prevailed in the Court of Appeals is obvious. ('Heads I win big,' says the Government; 'tails we come back down and litigate again on the basis of a more moderate Government theory.')"). Under these circumstances, there is no reason to believe that the Eighth Circuit would now reject any premise on which its decision was based.

Second, the Kansas Supreme Court's decision would not determine the ultimate outcome of this litigation. A remand would not result in the application of now-clarified Kansas law. Rather, it would result in the application of Missouri law, because the Missouri borrowing statute comes into play only when another state's limitations period is shorter than Missouri's. *KPERS III*, 61 F.3d at 614. Nor would a remand change the disposition. The Eighth Circuit, applying Missouri law, would still affirm

the district court's grant of summary judgment to respondents on statute of limitations grounds.[15] Moreover, as to Peat Marwick, summary judgment would likely also be affirmed on the alternative ground (presented to both the district court and the Eighth Circuit) that any alleged negligence by Peat Marwick did not cause petitioner to suffer any damages.[16]

Finally, this Court has made clear that "if it appears that the intervening development . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence*, 116 S. Ct. at 607. A GVR order would be inappropriate here for both of these reasons. Remanding this case would inappropriately reward petitioner's abusive and manipulative litigation strategies, which have already been extremely costly to the federal courts. In addition, any benefits from a remand would clearly be outweighed by the

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[15] The district court found that petitioner had notice of its claim more than five years before it sued respondents (App. 58a-61a), thus rendering petitioner's claims time-barred under the Missouri five-year period.

[16] The very same facts that the district court found were undisputed and that cause petitioner's claims to be barred under the two-year statute of limitations compel a finding that nothing Peat Marwick did caused petitioner to suffer any of its alleged losses. Petitioner claims that it suffered losses because it continued to make direct placement investments as a result of Peat Marwick's alleged failure to report that investments in petitioner's portfolio had suffered permanent impairment as of June 30, 1988. The undisputed facts, however, show that petitioner was on notice of the purported fraud with respect to those investments in December 1986 and took no action. (App. 36a-44a.) The undisputed facts also show that petitioner had knowledge of at least $51 million of permanent impairment in its private placement investment portfolio by September 1989, yet it took no action to stop its direct placement investments. (Petitioner's Appendix in the Eighth Circuit, p. 2232.)

substantial costs involved in having the Eighth Circuit consider this case for a ninth time.[17]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM F. LLOYD
JEFFREY R. TONE
NANCY A. TEMPLE
HILLE R. SHEPPARD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

DONALD W. ROSE
Associate General Counsel
KPMG PEAT MARWICK LLP
55 East 52nd Street, 32nd Floor
New York, New York 10055
(212) 909-5412

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents
KPMG Peat Marwick LLP and Robert W.L. Spence

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* Counsel of Record

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[17] As Chief Justice Rehnquist has observed, "requiring the Court of Appeals to delve into the facts and law of [a] case again, months after it denied rehearing, is not without cost. The typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year. For us to require a busy court to once more revisit the merits of this state law dispute gives these petitioners more of the time and resources of the federal judicial system than they deserve." *Thomas v. American Home Prods., Inc.*, 117 S. Ct. 282, 285 (1996) (Rehnquist, C.J., dissenting from GVR order).